MOTION FILED
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No. 92-1306

In The

Supreme Court of the United States

October Term, 1992

TONY ALAMO,

Petitioner,

v.

ROBERT A. MILLER; KODY MILLER BY ROBERT A. MILLER; ROBERT MILLER BY ROBERT A. MILLER; CAREY MILLER; JEREMIAH JUSTIN MILLER BY CAREY MILLER; RICH MILLER; AND JAMES MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER OF SUSAN GROULX, WILLIAM B. SAUNDERS, WILLIAM K. PARRISH, GERARD DEMOULIN, WILLIAM CURRY, DOROTHY CURRY, JOSEPH ORLANDO, LENORE ORLANDO, AL REID, JOHN KOLBEK, TOM BARNETT, AND MARYANNE BARNETT

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MOTION OF SUSAN GROULX, WILLIAM B. SAUNDERS, WILLIAM K. PARRISH, GERARD DEMOULIN, WILLIAM CURRY, DOROTHY CURRY, JOSEPH ORLANDO, LENORE ORLANDO, AL REID, JOHN KOLBEK, TOM BARNETT, AND MARYANNE BARNETT FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Susan Groulx, William B. Saunders, William K. Parrish, Gerard Demoulin, William Curry, Dorothy Curry, Joseph Orlando, Lenore Orlando, Al Reid, John Kolbek, Tom Barnett, and Maryanne Barnett respectfully move for leave to file the attached brief *amicus curiae* in support of the Petitioner, Tony Alamo.

The movants are associates of the Alamo Christian Church. They are representatives of the hundreds of people who have been directly affected by the decisions entered below. This Court, in the case of *Tony and Susan Alamo Foundation, et al.* v. *Secretary of Labor,* 471 U.S. 290 (1985) has described the associates as follows:

> The Tony and Susan Alamo Foundation is a nonprofit religious organization. . . . Among its primary purposes, as stated in its Articles of Incorporation, are to "establish, conduct, and maintain an Evangelistic Church; to conduct religious services, to minister to the sick and needy, to care for the fatherless and to rescue the fallen, and generally to do those things needful for the promotion of Christian faith, virtue, and charity." [footnote omitted] The Foundation does not solicit contributions from the public. It derives income largely from the operation of a number of commercial businesses

> [all of which at this writing have been closed and are no longer in operation][1]. . . . *The businesses are staffed largely by the Foundation's "associates, most of whom were drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation. These workers receive no cash salaries, but the Foundation provides them with food, clothing, shelter, and other benefits. Tony and Susan Alamo Foundation, et al.* v. *Secretary of Labor,* 471 U.S. 290, 292 (1985) (emphasis added)

The effect of the decisions entered below have been devastating to these associates. As a result of the judgments entered below and the ruthless execution efforts of the Respondents, the associates have lost their homes, their vehicles, and a majority of their personal property some of which had been accumulated over the past twenty years. They have literally had money taken from their pockets as a result of the collection efforts of the Respondents in executing the Judgment entered below. These displaced individuals and their children have been required to live in the streets, in cars, and, for some of the lucky ones, in run-down motels. Moreover, they have been forced to go for extended periods of time with little or no food.

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[1] As noted in *Tony and Susan Alamo Foundation, et al.* v. *Raymond J. Donovan, Secretary of Labor,* 567 F. Supp 556, 562, (1982) "[A]ssociates work for "outside employers" at various times and turn their paychecks over to the Foundation. Others contract for various jobs, such as construction work, and turn the contract proceeds over to the Foundation."

It is felt by the movants that the courts below have neglected to consider the fact that the injustices inflicted upon the Petitioner, Tony Alamo, have also affected hundreds of people such as the associates and their children.

The movants contend that there are serious questions of impartiality on the part of the lower courts, which only this Court can review and relieve. It is the intent of the movants to bring to this Court's attention important facts concerning the context in which this case has been decided below, which facts do not appear in Tony Alamo's Petition for Writ of Certiorari.

Petitioner has consented to the filing of this brief *amicus curiae*. Respondents have not granted consent.

Dated: March 8, 1993.

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INTEREST OF *AMICUS CURIAE*

The interest of *amicus* is set forth in the motion for leave to file attached hereto.

INTRODUCTION AND SUMMARY OF ARGUMENT

The movants submit that the District Court and the Court of Appeals erred in denying the Petitioner's Motion based upon Rule 60(b)(4) of the Federal Rules of Civil Procedure, and that the judgment entered below should be reversed.

ARGUMENT IN SUPPORT OF PETITIONER

This Court should grant Tony Alamo's Petition for Writ of Certiorari, because the treatment he received from the Court of Appeals in the *Miller II*[2] appeal fell so far below the minimum standards of due process of law as to condemn *Miller II* as a travesty of justice that no American should be forced to suffer and that this Court should be unwilling to tolerate.

The constitutional issues Tony Alamo raised in his Federal Rule of Civil Procedure 60(b)(4) motion in the District Court and on appeal in *Miller II* were:

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[2] As in the Petition for a Writ of Certiorari references herein are made to the unpublished opinion of the Court of Appeal for the Eighth Circuit filed November 19, 1992, as "Miller II" and to the earlier opinion of the Court of Appeals reported at 924 F.2d 143 (8th Cir. 1991) as "Miller I."

(a) whether the District Court obtained personal jurisdiction over him in the original action simply because it had jurisdiction over his alleged *alter-ego* corporations;

(b) whether the Court of Appeals in *Miller I* could impose upon him an unheard-of *"non-default default judgment"* (as the petitioner, Tony Alamo, describes it), even though the Court of Appeals held that he *had* appeared in the District Court through the *alter-ego* corporations;

(c) whether on an appeal by the supposed *alter-ego* corporations, Tony Alamo may be held to have been properly served by publication, when he personally participated in neither the District Court proceedings that led to the finding of *alter-ego* status nor the appeal;

(d) whether a default judgment could be imposed upon Tony Alamo when the supposed *alter-ego* corporations, which had timely responded to the Complaint, were excluded from the hearing on damages and whether such imposition would be a denial of due process; and

(e) whether the Millers had engaged in a sufficiently "diligent inquiry" into Tony Alamo's whereabouts to justify service of process on him by publication, as the basis for entry of the default judgment.

These issues are unequivocally significant and difficult. Frivolity is as far removed from these questions as justice is from the decisions entered below.

The District Court avoided coming to grips with these issues on the Rule 60(b)(4) motion by merely relying on the supposed "authority" of *Miller I*. As Alamo explains in his petition. *Miller I* did not decide any of

these issues against him. For example, the "non-default default judgment" was the surprise consequence of the erroneous conclusion in *Miller I* that Tony Alamo had appeared in the District Court in the original action through the *alter-ego* corporations. *Miller I* simply announced that Tony Alamo had so appeared, without further consideration of how, constitutionally, to reconcile the alleged *actual appearance* with the *default* judgment the District Court had entered against him. Similarly, *Miller II* avoided grappling with the issues in two ways: first, by refusing to hold an oral argument; and second, by affirming the District Court in an essentially one-line, unpublished *per curiam* opinion in which the Court of Appeals refused even to state the issues, let alone to show why Tony Alamo's position lacked merit.

The Court of Appeal's *modus operandi* in *Miller II* is doubly suspicious, because it contradicted the publicized policy of the court's Chief Judge. First, in an article in the ABA Journal in 1984, Judge Richard S. Arnold, then a Circuit Judge but Chief Judge of the Eighth Circuit when the Court heard *Miller II*, had emphasized

> the importance of oral argument. It is a crucial stage in the decision-making process. . . .
>
> Oral argument is important to me because it is the only time that all of the members of the court and all of the lawyers are together to discuss the case. When I come into the courtroom for argument, I usually have at least an inclination as to how the case should go. This is based on a reading of the briefs and, in those few cases when time permits, additional

> research or reflection. But this is only an inclination: it still must be tested against statements that counsel will make in open court.
>
> In close cases and cases in which the facts and law are not completely clear, I try to give counsel some hint of my tentative decision. I typically address a question to counsel for the side that seems likely to lose. . . .
>
> That question is not simply a debating point. It is a genuine request for help. And occasionally . . . a lawyer will come up with an answer that really shakes my tentative convictions.
>
> . . . The oral argument is a lawyer's last fair chance to have some influence on the outcome.
>
> . . .
>
> If you have an appeal, don't think your work has ended when the briefs are filed. Your work has just begun. The crucial, perhaps decisive, phase of the case still lies ahead – at the oral argument.[3]

Tony Alamo did not receive, on these complicated, constitutional issues a "last fair chance" to influence the panel on the outcome of this case. His petition for a writ of certiorari presents comprehensive evidence that both the law and the facts in *Miller II* were overwhelmingly in

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[3] M.H. Bright & R.S. Arnold, "Oral Argument? It May Be Crucial!", 70 *ABA Journal* 68 (Sept., 1984), at 69, 70. In a sidebar, the editors of the *Journal* noted that Judge Arnold considered oral argument "necessary" in 75%, and "helpful" in 80%, of the cases he had heard, and that oral argument "had a crucial effect on Judge Arnold * * * in a substantial number of the cases he heard". *Id.* at 70.

his favor. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), eviscerated the conclusion of *Miller I* that the appearance by the allegedly *alter-ego* corporations in the District Court constituted an appearance by Tony Alamo. *Hovey v. Elliott*, 167 U.S. 409 (1897), demolished the notion that *Miller I's* creation of an unprecedented "non-default default judgment" against him was in compliance with the notions of due process. And the record of the Millers' feeble attempts to locate and serve Tony Alamo, prior to seeking service by publication, exposed their lack of constitutionally sufficient "diligence". Yet, even if the Court of Appeals could have misconstrued the law and the facts are not conclusively against the Millers, the issues were at least "close" or "not completely clear."

Nonetheless, confronted with these important and complex issues, the Court of Appeals chose to forego any "genuine request for help" from Alamo's lawyers at oral argument, and instead peremptorily denied them their "last fair chance to have some influence on the outcome" of the case. The panel simply omitted "the crucial, perhaps decisive, phase of the case", although this course of action flew in the face of the admonition of the then Chief Judge of the Circuit.

Second, in an article in *Litigation* in 1983, Judge Richard S. Arnold had also warned that

> [t]he habit of unpublished opinions . . . ought to be examined. . . .
>
> . . . [T]he vice . . . is that most of our courts have local rules prohibiting the citation of unpublished opinions and providing that they shall not have precedential effect. *E.g.*, 8th Cir. R. 8(i). The reason for such rules is that if an

> opinion is unpublished, that lawyers cannot get access to it, and it's not fair for them to be governed by it. I understand that, but the result may be that a judge who writes (and the panel that files) an unpublished opinion holding one way on a certain point of law can – so far as the rules of court are concerned – feel perfectly free to decide the other way the next day, and that is not the kind of behavior that we as judges would consciously engage in, and not the kind of behavior that we conceive of as being consistent with the judicial function.
>
> So when it is possible, and unless the point involved is absolutely frivolous, . . . it is well for opinions to be published, so that they can be subject to scrutiny and criticism, and it is well for one of the judges on the panel to be willing to put his or her name on that opinion. I can tell you from personal experience that you don't feel so vulnerable when you have written a *per curiam*. You think to yourself, "Well, I am one of the three on this, but they can't blame it on me personally because it isn't really I who am writing this, it is the court." . . .
>
> If we can limit this habit to the instances where it's utterly necessary, then we can to that extent reduce the impression that we govern not by reason but by fiat.[4]

Again, Tony Alamo's petition presents comprehensive evidence that the "points [of law] involved" were anything but "absolutely frivolous", that the unpublished opinion in *Miller II* was anything but "utterly necessary",

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[4] R.S. Arnold, "From the Bench: Judges and the Public", 9 *Litigation* 5 (No. 4, Summer, 1983), at 6.

and therefore, that *Miller II* can give no "impression" other than that the Court of Appeals "govern[s] not by reason but by fiat".[5]

Indeed, the clash between *Miller I* and *Zenith Radio Corp.*, and the extravagant absurdity under *Hovey* of the "non-default default judgment" *Miller I* created, compel the conclusions that the panel in *Miller II* hid behind an unpublished, unexplained *per curiam* opinion so that the Judges could "feel perfectly free to decide the other way the next day" on the *alter-ego* issue, and would not "be subject to scrutiny and criticism" on that issue and, indeed, to outright embarrassment on the "non-default default judgment". The movants submit that none of the Judges was "willing to put his . . . name on the opinion", because none of them could imagine a plausible defense for *Miller I*.

But, perhaps, also at work in *Miller II* was something even more questionable than the panel's inability to rationalize *Miller I*. Morris S. Arnold was the District Court judge in the original action who entered a default judgment against Tony Alamo for having failed to appear, and then found the corporations to be Tony Alamo's *alter-egos*,

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[5] If the issues Tony Alamo raised were so "absolutely frivolous" as to justify an unpublished opinion, surely *Miller II* could easily have explained *why*. Yet, *Miller II* said only that "[t]he district court's rulings are clearly correct". And the District Court, in essence, said only that *Miller I* had already decided the issues against Tony Alamo. See, Petitioner Appendix at 2a, 6a. Overall, then, *Miller II* simply relied on *Miller I*. But, although *Miller I* had generated the absurd "non-default default judgment", it contained not one word alluding to the constitutional problems in what the Court had done.

without noticing the self-contradiction in entering a *default* judgment against a defendant who was supposedly present in court through the *alter-ego* entities. The complexity of the contradictions become more obvious when one considers that the default hearing on damages was held with the supposed *alter-ego* corporations being excluded, though having timely entered an appearance in the case. The District Court Judge's brother, Richard S. Arnold, was then a Judge of the Court of Appeals for the Eighth Circuit. *Miller I* also failed to acknowledge the absurdity of the "non-default default judgment" it allowed. Perhaps this was the result of simple oversight, or perhaps because to do so (and to reverse on the ground of that flagrant error) would greatly have embarrassed both Morris S. Arnold and Richard S. Arnold.

Richard S. Arnold became Chief Judge of the Court of Appeals for the Eighth Circuit on January 7, 1992. Morris S. Arnold became a judge of that Court on May 26, 1992. On February 20 and May 27, 1992, Tony Alamo filed his notices of the appeals later consolidated in *Miller II*. The parties briefed the appeals from May through August 1992, and the court decided *Miller II* on November 19, 1992. Thus, during the critical period of consideration of the appeal, the brothers Arnold were both members of the Court of Appeals.

The decision of the Court of Appeals in *Miller I* (to impose an unprecedented "non-default default judgment") was certainly a decision the Court of Appeal would wish to avoid revisiting. It is, after all, not every day that a court creates something as unparalleled as a "non-default default judgment." Thus, the panel in *Miller*

II had a powerful incentive to avoid any further attention being given to the "legal reasoning" in *Miller I*. Such avoidance was accomplished in the Court of Appeals' unpublished, one-line *per curiam* opinion. Moreover, the incentive was intensified by the central involvement of the brothers Arnold, as any decision in *Miller II* that openly acknowledged the errors of *Miller I* (and of the preceding District Court decision by Morris S. Arnold) would have created a conflict between the Arnolds and would have reversed and perhaps embarrassed the panel in *Miller I*. Common sense forces one to see how this situation would at least subconsciously pressure the panel in *Miller II* not only to refrain from writing an opinion which addresses the substantive issues, but also to keep the issue from resurfacing by denying any oral argument at which Tony Alamo's lawyers could have aired the issues in public, and by refusing to publish even the one-line *per curiam* opinion the panel finally did write.

Thus, even under normal circumstances, the panel in *Miller II* would have found itself in a compromising situation that tested to the limit its ability to resist the temptations of institutional and personal favoritism.[6]

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[6] In late 1992, however, the circumstances were far from normal. On December 9, 1992, a newspaper columnist reported on possible nominees by then President-elect Clinton for appointment to the Supreme Court of the United States:

> The only name Clinton has ever mentioned as a possible Supreme Court nominee is New York Gov. Mario Cuomo. Beyond that, there is only speculation. The most frequent object of speculation has been Richard Arnold, * * * who since 1980 has served on the Eighth

Admittedly, that is no proof that the members of the panel in *Miller II* were subconsciously overwhelmed by the institutional, personal, and/or political pressures described above. There is no doubt, however, that those pressures were all too present, and that, notwithstanding the serious constitutional issues raised by Tony Alamo, the panel did deny oral argument, did write only a one-line *per curiam* opinion, and then did transmit its unknown reasoning to an unpublished opinion. These undeniable facts must leave any concerned observer with the troubling impression, that (in the words of Judge Richard S. Arnold) in Tony Alamo's case, the Court of Appeal was "govern[ed] not by reason, but by fiat."

How, then is Tony Alamo ever to receive a fair hearing, and an open, thoughtful consideration of the serious

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U.S. Circuit Court of Appeals. Carelli, "Clinton, Gore Hobnob with Supreme Court Justices" Los Angeles Metropolitan New-Enterprise, Wednesday, December 9, 1992 at 7.

If (as it seems fair to presume), this "speculation" about the nomination of Richard S. Arnold to the Supreme Court began shortly after Mr. Clinton's election on November –, 1992, it would have been widespread when the Court of Appeals decided *Miller II* on November 19, 1992. It should be noted that the Court of Appeals had originally scheduled an oral argument for November 12, 1992. But it cancelled the argument, and instead took the case under submission on that date. This would have added a further powerful subconscious incentive for the panel in *Miller II* to avert its eyes from the mess the District Court and the panel in *Miller I* had made of Tony Alamo's case, so as to minimize any untoward publicity that might tarnish the reputations of the brothers Arnold in even the slightest degree and thereby possibly jeopardize Richard S. Arnold's chances for nomination.

constitutional issues his petition raises; and how is the federal judicial system as a whole to convince the public that it does "govern by reason" after all; unless *this* Court steps in now to rectify the Court of Appeals' serious errors on these important constitutional issues.

This travesty of justice has resulted in real suffering by hundreds of associates, their spouses, and their children. They have been displaced from an environment to which many had been accustomed for over fifteen years. Their homes and their personal belongings have been taken from them, not to mention their way of life. Heretofore, the lower Courts have appeared to have ignored the issues raised by Tony Alamo in *Miller II*. It is the hope and prayer of the movants herein, and the other associates and their families, that this Court grant Tony Alamo's Petition for Writ of Certiorari and that the significant constitutional issues raised therein be fully and completely scrutinized by this Supreme Court.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Dated: March 8, 1993.

Respectfully submitted,

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